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# PUBLIC HEALTH REPORTS

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## CONSTITUTIONAL FOUNDATIONS OF FEDERAL PUBLIC HEALTH FUNCTIONS.<sup>1</sup>

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That the Government of the United States is a Federal Government is a commonplace not only to him who has made a study of its constitutional law, but as well to the average citizen. The legal effects of the federal character of our Government are, however, not altogether clear even to the lawyer, much less to him who has not been initiated into the mysteries of our constitutional law. The Constitution contains so many general clauses that resort must continuously be had to the courts for interpretation and construction, with the result that the exact and precise meaning of many constitutional provisions can be ascertained only by an examination of a long list of decisions. Where no decisions have been made on a particular point, we must reach our conclusions as the result of argument based on decisions made with regard to other points.

There are, however, certain general principles of construction, a knowledge of which will be of great assistance in enabling us to reach a determination as to the extent of power possessed by the National Government, and is absolutely necessary to the answer of the question which has been chosen for discussion to-day.

Probably the two most important of these principles are:

First, that the National Government may, under the Constitution, exercise only those powers which have been clearly granted to it by that instrument; and

Second, that where the Constitution thus clearly grants a power to the National Government, the action of that Government in the exercise of such a power is binding upon the States and upon the people of the United States even in case there may be a conflict between a national law and a State law.

To state these principles in another way, it may be said that the National Government is a government of enumerated powers, the presumption, where no mention of a power in the National Government is made, being in favor of the power of the States, but State

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<sup>1</sup> Read before the Conference, of State and Provincial Boards of Health, June 7, 1919, at Atlantic City, N. J. Published in the *American Journal of Public Health*, August, 1919.

law must give way to national law in the case of all matters as to which the National Government is competent and has taken action. The National Government, although of enumerated powers, is supreme in the exercise of the powers enumerated.

If now we examine the Constitution with the purpose of finding in the enumeration of powers granted to the National Government the mention of any power over the public health we shall discover that no such power has been expressly granted. We shall find, however, one clause granting the power to make all laws necessary and proper for carrying into execution any of the powers vested by the Constitution in the Government of the United States or in any department or officer thereof.

We must, therefore, examine some of the general clauses of the Constitution with the purpose of ascertaining whether any of these when combined with the power to make all laws necessary and proper for carrying into execution the powers granted are or may be construed as granting to the National Government powers relative to the public health.

The most important of these general clauses from the point of view of to-day's discussion is unquestionably the power to regulate commerce with foreign nations and among the several States. It is to be noted that the Constitution neither defines nor describes "commerce" nor states what is the meaning of the words "regulate" and "among the several States."

At first, governed by the particularistic States' rights ideas of the time, which were justified in large measure by the existing economic conditions, both Congress and the Supreme Court took a rather narrow view of the extent of this power. Thus when it came to be regarded about 1820 as necessary that the central government should make some provision for means of communication between the eastern States and the new States which had been established west of the Allegheny Mountains and in the Mississippi Valley, it was believed that the only authority possessed by Congress was to build roads, which, after they were built, should be handed over to the States. The States alone, it was thought, might administer them and care for their maintenance and repair.

The gradual centralization of economic conditions, which has been characteristic of American development, has, however, caused the adoption at the present time of a much more extended conception of national power under the Constitution. Thus the meaning of the word "commerce" has been greatly enlarged. Commerce as a subject of congressional regulation embraces at the present time, in the first place, transportation by both land and water and the means and instrumentalities of transportation. Commerce, i. e., the thing which under the Constitution may be regulated by Congress, therefore in-

cludes not merely the act of transporting persons or things from one place to another but as well both artificial land and water routes and their terminals, such as harbors, the vehicles by which the act of transportation is performed, and the persons, both carriers, shippers, and consignees, on the one hand, and employers and employed, on the other, who are engaged in the act of transportation.

In the second place, commerce embraces purchases and sales and the negotiations entered into in order to lead to sales of all articles ordinarily made the subject of trade, as well as agreements for such purchases and sales, made both between the purchasers among themselves and the sellers among themselves, on the one hand, and between the purchasers and sellers with each other, on the other.

In other words, commerce in the constitutional sense includes, on the one hand, the physical instrumentalities by which commerce is carried on and, on the other hand, the transactions on which trade relationships are based.

Finally, while commerce does not include manufacturing, the tendency is to regard manufacturing as a part of commerce where its regulation is necessary to the effective regulation of what is admittedly commerce.

All of these things, operations, and processes are regarded as within the regulatory power of Congress, provided they can be regarded as a part of commerce "with foreign nations" or "among the several States." Commerce of such a character is held to be that which originates in one State and terminates in another, as well as commerce which originates and terminates in the same State, provided the regulation of such commerce is necessary to the effective regulation by Congress of what is recognized as commerce with foreign nations or among the several States.

The word "regulate" is given an equally wide meaning. Thus, it is held that the power to regulate commerce includes the powers—

First, to construct, or provide, by the chartering of companies for the construction of, routes by land or water over which commerce with foreign nations or among the several States is possible, and to lay down the rules to be observed by those making use of such routes.

Second, the power to regulate includes the power to determine the private legal relations which shall exist among those persons engaged in the commerce subject to regulation, so far as those legal relations may affect the carrying on of commerce. Thus, Congress may regulate the contracts and liabilities between shippers and carriers, between carriers and their employees, between sellers and between purchasers, and between sellers and purchasers.

Finally, the power to regulate includes the power to prohibit commerce in certain articles and certain methods of carrying on commerce and to license those engaged in commerce.

The enormous extension which has been given to the power of Congress to regulate the commerce among the several States is causing the old distinction between a commerce among the several States which is subject to congressional regulation and commerce within the limits of a single State which is subject to State regulation almost to disappear and to subject all commerce to the power of Congress. This distinction has disappeared with regard to commerce carried on by water, which is spoken of as navigation.

The power of the National Government to regulate commerce may be exercised, it will be noticed, not merely with the idea of promoting commerce from an economic point of view, but as well with the idea of limiting commerce in order to protect the public health or safety. It includes, therefore, the power to establish quarantines and to deny the right of entry into the country or of transportation from one State to another to objects or persons where that entry or that transportation may, in the opinion of the competent authorities of the National Government, endanger the public safety.

The health powers which Congress possesses under the commerce clause are as a matter of fact, both because of actual conditions and also probably owing to our constitutional theory, larger in the case of foreign commerce than in that of commerce among the several States. At any rate, it is certain that in the case of foreign commerce the same perplexing questions which present themselves in the case of commerce among the several States do not arise. In the case of foreign commerce the only action the National Government can, in the nature of things, attempt to take is action in the nature of an embargo or an inspection. There is no question that it may do either of these things.

In the case of commerce among the several States, however, conditions are different. Congress may, it is true, deny to almost anything it sees fit the right to be an article of interstate commerce, and may punish those who, contrary to the law, ship the prohibited article from one State to another. But it is incompetent to prohibit either the manufacture or the use within a State of an article, however harmful, since these are matters within the jurisdiction of the States and not in that of the National Government. All the United States Government can do as a direct result of its commerce powers is to prohibit, under criminal penalties, the interstate transportation of articles.

Generally speaking, interstate or foreign transportation does not begin until the articles start on their journey. Any action which precedes transportation has to do with manufacture rather than with commerce and is, therefore, not within the competence of the National Government except in so far as its regulation may be necessary and proper for the effective exercise of the power to regulate commerce.

Transportation, furthermore, ceases when the articles have reached their destination and have either been taken out of the original package in which they were shipped or have left the hands of the person who brought them into the State, i. e., the consignee. Congress may not regulate or prohibit their use after they have thus fallen under the power of the State.

The United States Government may, however, as has been said, provide for the criminal punishment on the one hand of him who makes the prohibited shipment and on the other hand of the consignee who sells the prohibited article before the original package is broken. To exercise this power, however, it must have the means of determining whether the article transported falls within the prohibited class. It thus may provide for the labelling of the articles transported and for the inspection at the place of manufacture of articles intended for interstate transportation as well as for the licensing of the persons engaged in their manufacture. The United States Government has not, it is true, either inspection or licensing powers to the exercise of which manufacturers of articles destined for consumption within the State of manufacture must submit, but it has the power to deny to articles not inspected and not made by licensed manufacturers the right of interstate transportation.

Probably the two most notable attempts of the National Government to regulate commerce among the several States in the interest of the public health are the Pure Food and Drugs and the Child Labor Acts. The first, which forbade the transportation from one State to another of adulterated food products and drugs was upheld by the Supreme Court as a constitutional exercise of legislative power. The second forbade the transportation in commerce, among the several States, of goods made in factories in which children under 14 were employed or in which children under 16 were employed more than eight hours a day. This act was, by a divided court, held unconstitutional because it was regarded as an attempt to regulate the methods of manufacture within a State which were a matter for State and not for national regulation. The harm to health, which resulted from the manufacture of articles made by child labor, is done in the State of manufacture. The transportation of such articles can not, in the nature of things, be harmful. The damage done is thus due to manufacture and not to commerce.

We must therefore conclude that the health powers of Congress to be derived from the commerce clause of the Constitution relate for the most part to the act of transportation as it has been defined by the decisions. Whether this will always be the rule is open to some question. For in other directions, of which decisions under the anti-trust act are examples, actions which related to manufacture rather than to transportation have been held to come under the regulating

power of Congress. On the theory that they were prohibited by the Anti-Trust Act, combinations both of employers and employed with regard to manufacturing and sales within a State rather than transportation have been punished as illegal.

The second great source of national power with regard to the public health is to be found in the power granted by the Constitution to Congress to "lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States."

The powers derived by Congress from this clause of the Constitution are of two kinds. They are in the first place repressive and in the second place they are powers of positively promoting the public welfare.

In the first place Congress may, in the exercise of its taxing powers, impose on any occupation or any article which is deemed to be harmful a tax of a prohibitive character, for, as the Supreme Court has on more than one occasion said, "the power to tax is the power to destroy." An instance of the exercise of the taxing power by Congress with the purpose of making impossible the production of the article taxed is the law taxing phosphorus matches. An example more recent of this method of protecting the public health is the provision in the last revenue bill imposing what amounts to a prohibitive tax on all manufacturers employing child labor.

It will be noticed that the powers relating to the public health, which may be derived from the taxing power of Congress, are in some respects broader than those which find their origin in the commerce power. Under the former, methods of manufacturing within the States may for all practical purposes be prohibited, although Congress has no direct power of prohibition. Such a method of protecting the public health naturally lends itself to matters where prohibition rather than regulation is sought. But it may perhaps be suggested that this method of prohibition permits of the accomplishment of a good deal to which at first blush it may not seem to be adapted. Thus, what is to prevent the imposition by Congress of prohibitive taxes on all manufacturers who do not provide safety appliances for the protection of their workers or who do not secure sanitary conditions under which work may be carried on? The only answer to this question is that, while the limitations on the taxing power of Congress are few in number and rather ineffective in character, it has usually been considered that the classification of articles and persons for taxation must have some reasonable relation to the object sought. It may well be that either because such a classification would be regarded as improper or because the attempt to exercise the taxing power in this way would be regarded as a palpable evasion of the Constitution and an encroachment upon the rights of the States, such laws as have been suggested would be

held to be unconstitutional. The result of the litigation, which will unquestionably follow the attempt to impose special taxes on manufacturers employing child labor, will, doubtless, throw much light on this up-to-now unsettled question.

Another example of the use by the United States Government of its taxing power in the interest of the public health is to be found in the so-called Harrison Act relative to the sale of certain drugs. The purpose of this act is not so much prohibition as regulation. It is an interesting example, further, of an attempt to secure through the exercise of the taxing power information as to the users of drugs which is available for use by the officers of the States charged with the enforcement of laws regulating the use and sale of drugs. It may not be said that the use of the taxing power for this purpose is clearly constitutional.

But Congress may use its taxing powers not so much to destroy as to promote directly the public welfare. That is, it may appropriate the money derived from the collection of taxes for helping the States solve their sanitary problems. It may establish, as it has established, a national public health service which may be authorized to coöperate with and assist the health authorities in the States. It may establish hospitals and sanitariums provided it secures the consent of the States in which they may be situated. It may make grants to the States in aid of their health administration and may make such grants subject to the condition that the States maintain certain standards and submit to inspection.

But while the United States Government may thus exercise through its power of appropriating money a profound influence on State public health administrations and through them on the public health of the country generally, it may not of its own accord and without the consent of the States concerned step in to interfere with the sanitary work of the States.

In the foregoing what has been borne in mind has been for the most part the power which the United States Government possesses with regard to matters usually regarded as reserved by the Constitution for the States. It must, however, be remembered that the United States Government has powers exclusively its own, such as its powers in the District of Columbia, the Territories, and the United States reservations. Here its power is unlimited by any consideration of States' rights. Furthermore, in time of war its powers to raise and support armies, to provide and maintain a navy, and to declare war are construed to carry with them the power to do, even within State lines, what is necessary to protect the health of its soldiers and sailors. We have recently had notable instances of the exercise of such powers. But, fortunately, a state of war is not a normal condition, and while the health powers of the United States Government at such a time are very important, still they are



infrequently exercised and consequently have little permanent influence.

A word also should be said as to the possibility of the exercise of health powers by the United States Government as a result of its exercise of its treaty-making power. It is unquestionably true that Congress may exercise legislative power to carry out the provisions of a treaty which it would not possess had the treaty not been made. We have had, however, few instances of the exercise of such powers, and fewer still decisions upon their propriety. It would therefore be unwise to base any large health powers upon so uncertain a foundation. But it is well to remember that the tendencies nowadays are centripetal in character and that, with the increasing economic unity of the world, much may in the future be desirable if not necessary which in the past would have been considered almost outside of the realm of even speculation.

But whatever may be the outcome of the future, for the present it is safer to base such health powers as the United States Government may possess upon either its commerce or its taxing powers, and there is little doubt that, with the increasing feeling that our national interests are growing in importance with the improvement in the means of communication, the powers of the United States Government will increase to suit the changes in our national life. Insanitary conditions, as a matter of fact, are no longer of merely local concern. Epidemics are not respecters of State or even National lines. A keener realization of this fact will unquestionably have the effect of causing a broader interpretation of existing powers and may well result in constitutional amendment where such broader interpretation is not possible.

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#### **UNIVERSITY OF ILLINOIS TO CONDUCT HEALTH-ADVICE COLUMN FOR NEWSPAPERS.**

The department of hygiene and public health of the University of Illinois has inaugurated a press bulletin service whereby the larger newspapers of Illinois will be supplied weekly with news stories and information articles pertaining to public health, hygiene, and sanitation. This is announced to be part of the university's public health education work, the articles being contributed by members of the faculty who are authorities on their particular branches of health work.

The initial bulletin contains three articles: One on warding off influenza by sterilizing eating utensils, one dealing with the care of the influenza patient, and one entitled "Poor vision a common cause of inefficiency."

The articles are well written, the information is accurate, the advice serviceable, and altogether the service thus inaugurated will be of considerable help in promoting health education of the people.